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In The
Supreme Court of the United States

EPIC SYSTEMS CORPORATION, *Petitioner,*
v.
JACOB LEWIS, *Respondent.*

ERNST & YOUNG LLP, ET AL., *Petitioners,*
v.
STEPHEN MORRIS, ET AL., *Respondents.*

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*
v.
MURPHY OIL USA, INC., ET AL., *Respondents.*

On Writs of Certiorari to the United States Courts of Appeals for the Fifth, Seventh, and Ninth Circuits

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS JACOB LEWIS AND STEPHEN MORRIS AND PETITIONER NATIONAL LABOR RELATIONS BOARD

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights, freedoms, and structural safeguards that our nation's charter guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text, history, and values, and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The National Labor Relations Act (NLRA) provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. It further makes it an unfair labor practice for employers to "interfere with, restrain, or coerce employees in the exercise" of those rights. *Id.* § 158(a). Notwithstanding those guarantees under federal law,

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

the employers in these cases required their employees and job applicants to sign, as conditions of employment, binding arbitration agreements waiving their right to participate in any joint, class, or collective action against their employer relating to employment issues. Ernst & Young Br. 7-8 [hereinafter E&Y Br.]; Epic Br. 6-7; U.S. Br. 6. Thus, when the plaintiffs in these cases tried to vindicate their rights under federal law by jointly filing class and collective actions in court, their employers moved to dismiss their actions and compel individual arbitration of their claims.

According to these employers, they may force their employees to participate in individual arbitration—despite the NLRA's guarantee that employees may "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. § 157—because, in part, the NLRA's guarantee that employees may engage in "other concerted activities" does not encompass class, collective, or other group legal actions. As they explain it, because "the NLRA was enacted before Rule 23 and the [Federal Labor Standards Act (FLSA)], neither of which existed until 1938," "Congress could not have intended 'concerted activities' to include class actions under Rule 23 or collective actions under the FLSA." Epic Br. 32; *see* E&Y Br. 42 ("there is no indication that, when Congress enacted the NLRA, it was concerned about protecting the ability to invoke class or other collective procedures . . . especially because the procedures at issue in cases such as this one did not exist at the time the NLRA was enacted"). This is wrong.

While Rule 23 and the FLSA did not exist when the NLRA was drafted, "modern class actions are part of a much longer tradition of . . . group litiga-

tion." Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* 3 (1987) [hereinafter Yeazell, *From Medieval Group Litigation*]. Indeed, class actions "trace their origins . . . to the unwritten practices of English Chancery," Raymond B. Marcin, *Searching for the Origin of the Class Action*, 23 Cath. U. L. Rev. 515, 517-18 (1974), and they continued to exist in one fashion or another through the succeeding centuries.

In the United States, the practice of group litigation was formalized as early as 1843 with the adoption of the Federal Rules of Equity, which provided for group litigation "[w]here the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it." Fed. Equity R. 48, 42 U.S. lvi (1842) (repealed 1912). Although Federal Equity Rule 48 provided that absent parties would not be bound by decrees entered through group litigation, that aspect of the rule was often ignored by the courts, George M. Strickler, Jr., *Protecting the Class: The Search for the Adequate Representative in Class Action Litigation*, 34 DePaul L. Rev. 73, 78 (1984), and was eliminated altogether when the rule was simplified in 1912, with the adoption of Rule 38.

Under Federal Equity Rule 38, courts could permit "one or more [to] sue or defend for the whole" when "the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court." Fed. Equity R. 38 (1912) (repealed 1938), *in The New Federal Equity Rules Promulgated by the United States Supreme Court at the October Term, 1912*, at 203 (James Love Hopkins ed., 1918) [hereinafter *The New Federal Equity Rules*]. While the new rule left unresolved many questions, both

conceptual and practical, about how group litigation should be prosecuted in federal court, it left no doubt that group litigation would continue. Thus, by the time the NLRA was enacted in 1935, group litigation in various forms was well established in the federal courts. Indeed, roughly 15 years before the NLRA was adopted, this Court observed that "[c]lass suits have long been recognized in federal jurisprudence. . . . The subject is provided for by rule 38 . . . of the equity rules of this court promulgated in 1912." *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 363 (1921).

Against this background, the NLRA broadly guaranteed that "[e]mployees shall have the right to . . . engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. By casting the law's guarantee in these broad terms, its drafters ensured that it would protect all manner of "concerted activities" in which workers engage for their "mutual aid or protection," without regard to the particular form those "concerted activities" would take. The activities protected by the NLRA therefore include employees' efforts to bring representative actions under Rule 23 and the FLSA, both of which evolved out of the same tradition of group litigation that was already long established when the NLRA was enacted. Indeed, when Rule 23 was adopted, it was explicitly deemed a "substantial restatement" of Equity Rule 38. Fed. R. Civ. P. 23, 1937 advisory committee note. And when the FLSA was first enacted in 1938, it explicitly allowed "one or more employees for and in behalf of himself or themselves and other employees similarly situated" to bring an action against an employer who violated the law, as well as for "such employee or employees [to] designate an agent or representative to

maintain such action for and in behalf of all employees similarly situated." Pub. L. No. 75-718, 52 Stat. 1060, 1069 (1938) (codified as amended at 29 U.S.C. §§ 201-219). Thus, the NLRA's broad protection of "concerted activities" should not exclude Rule 23 class actions and FLSA collective actions simply because group litigation in those specific forms was not yet around when the NLRA was adopted. Both are "concerted activities" in which employees can engage for their "mutual aid and protection," and as such they are protected by the NLRA.

ARGUMENT

THE TERM "CONCERTED ACTIVITIES" IN THE NLRA ENCOMPASSES EMPLOYEES' EFFORTS TO BRING RULE 23 CLASS ACTIONS AND FLSA COLLECTIVE ACTIONS.

When the NLRA was enacted in 1935, it provided that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities, for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. According to the employers in these cases, the NLRA's guarantee that employees may "engage in other concerted activities" cannot encompass Rule 23 class actions or FLSA collective actions because "the NLRA was enacted before Rule 23 and the FLSA, neither of which existed until 1938." Epic Br. 32; *see* E&Y Br. 42. This is wrong.

While Rule 23 and the FLSA postdate the NLRA, group litigation does not. To the contrary, as the Seventh Circuit recognized, group litigation has a rich history dating back to the twelfth century. *See* Epic Pet. App. 8a ("Rule 23 may have been yet to

come at the time of the NLRA's passage, but it was not written on a clean slate. Other class and collective procedures had existed for a long time on the equity side of the court . . . ."). The Rule 23 class action and the FLSA collective action both developed out of that rich tradition. Thus, the fact that the NLRA was enacted prior to Rule 23 and the FLSA is entirely beside the point. The NLRA broadly guarantees employees the right to engage in "concerted activities," and in so doing, it protects employees' efforts to bring Rule 23 class actions and FLSA collective actions no less than it protected employees' efforts to engage in the forms of group litigation that existed when the NLRA was adopted.

I. GROUP LITIGATION, INCLUDING THE PRECURSOR TO RULE 23, LONG PREDATES THE ADOPTION OF THE NLRA.

While the parameters of the modern class action are defined by Federal Rule of Civil Procedure 23, the adoption of that rule was hardly the beginning of litigation in which many individuals come together to pursue common claims. As this Court has noted, "representative suits have been recognized in various forms since the earliest days of English law." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832 (1999) (citing Yeazell, *From Medieval Group Litigation*, *supra*, and Marcin, *supra*); *see* Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 Ariz. L. Rev. 687, 687 (1997) [hereinafter Yeazell, *Past and Future*] ("group litigation has a remarkably deep history"). Indeed, group litigation dates back to the twelfth century, when "a writ of Henry III took to task the archbishop of Canterbury" after he "had received a complaint from some of his tenants that the archbishop had refused them the right of" litigating as a group. Yeazell, *Past and Fu-*

ture, *supra*, at 689-90. "The writ commanded the archbishop to recognize this widespread custom in his own courts: 'according to our law and custom of the realm . . . villages and communities of villeins . . . ought to be able to prosecute their pleas and complaints in our courts and in those of others through three or four of their number." *Id* at 690.

While its shape and form continued to evolve over the ensuing centuries, group litigation became established in the United States no later than the early nineteenth century, when Justice Joseph Story recognized that there are exceptions to the general rule that "all persons, materially interested in the subject of the suit, however numerous, ought to be parties." *West v. Randall*, 29 F. Cas. 718, 722 (C.C.D.R.I. 1820). As he explained, "where the parties are very numerous, and the court perceives, that it will be almost impossible to bring them all before the court; or where the question is of general interest, and a few may sue for the benefit of the whole," "in these and analogous cases, if the bill purports to be not merely in behalf of the plaintiffs, but of all others interested, the plea of the want of parties will be repelled, and the court will proceed to a decree." *Id. But see id.* at 723 (explaining that the court "will withhold its interposition" if the decree cannot "be fitly made, without substantial injury to third parties").

This view of group litigation was codified when the Federal Rules of Equity were adopted in 1843. Rule 48 provided that "[w]here the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the

plaintiffs and the defendants in the suit properly before it." Fed. Equity R. 48. While Rule 48 provided that "in such cases the decree shall be without prejudice to the rights and claims of all the absent parties," *id.*, "that provision of Rule 48 . . . was largely ignored by the courts," Strickler, *supra*, at 78, at least in certain kinds of class actions, Geoffrey C. Hazard, Jr., et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. Pa. L. Rev. 1849, 1849 (1998) ("in the eighteenth and early nineteenth centuries, English and American decisions oscillated between saying that absent members of a class were bound by a decree and that they were not. The same pattern of equivocation persisted over the next century"); *id.* at 1920-21 (discussing a treatise writer who identified two types of class suits and suggested that decrees were only binding in one type).

In *Smith v. Swormstedt*, for example, this Court held that "[t]he rule is well established, that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others." 57 U.S. (16 How.) 288, 302 (1853). As this Court further explained, "a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court." *Id.* at 303. And in *United States v. Old Settlers*, three individuals sued on behalf of "the 'Old Settlers,' or 'Western Cherokee,' Indians." 148 U.S. 427, 427 (1893). This Court rejected the "suggestion that these so-called 'commissioners' do not bring themselves as strictly within the rule upon this subject as they should," concluding that "they do so far represent the interests or rights involved that the case may be allowed to proceed to judgment." *Id.* at 480.

When the Federal Rules of Equity were revised in 1912, and Rule 48 was replaced by Rule 38, the provisions for class actions were simplified: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." Fed. Equity R. 38. Significantly, "on the recommendation of the Bar Committee of the Circuit Court of Appeals of the Second Circuit," the "last sentence of the former Rule 48"—the one providing that absent class members would not be bound by the decree—was omitted "'for the reason that in every true 'class suit' the decree is necessarily binding upon all parties included in the decree.'" *The New Federal Equity Rules*, *supra*, at 169 (citing *Coann v. Atlanta Factory Co.*, 14 Fed. Rep. 4 (C.C.N.D. Ga. 1882); *Am. Steel Co. v. Wire Drawers' Union*, 90 Fed. Rep. 598 (C.C.N.D. Ohio 1898)); *see Christopher v. Brusselback*, 302 U.S. 500, 505 (1938) ("The omission from old Rule 48 amended and promulgated as Rule 38 . . . of the phrase . . . 'the decree shall be without prejudice to the rights and claims of all absent parties' preserved unimpaired the jurisdiction of federal courts of equity in a class suit to render a decree binding upon absent defendants affecting their interest in property within the jurisdiction of the court.").

Following the adoption of Rule 38, courts invoked the rule to hear claims brought by plaintiffs on behalf of themselves and others similarly situated. In *Little v. Tanner*, for example, "retail merchants residing in the city of Spokane" sued to "restrain the Attorney General of the state, the prosecuting attorney of Spokane county, and the county treasurer of Spokane county from enforcing the provisions of [a particular state law] as against the plaintiffs and all other per-

sons similarly situated." 208 F. 605, 607 (E.D. Wash. 1913), *rev'd on other grounds*, 240 U.S. 369 (1916). Rejecting the argument that the "several plaintiffs may not join in the same suit," the court quoted Rule 38 and stated that "[t]his case would seem to fall within the spirit and equity of that rule." *Id.* at 608; *see Tanner v. Little*, 240 U.S. 369, 374 (1916) ("The court ruled against the motions to dismiss, and, concurring with the ruling as far as it retained jurisdiction of the suits and the persons of the defendants, we pass to the consideration of the validity of the statute of the state."); *see also Merchants' & Mfrs.' Traffic Ass'n v. United States*, 231 F. 292, 294-95 (N.D. Cal. 1915) (noting the "well-known rule that bills may be filed in the name of an unincorporated association, and by parties on behalf of others similarly situated" and citing, among other things, Rule 38); *Chew v. First Presbyterian Church*, 237 F. 219, 241 (D. Del. 1916) ("[t]he right of the complainants to sue on behalf of themselves and others is supported by equity rule 38"); *Gramling v. Maxwell*, 52 F.2d 256, 260 (W.D.N.C. 1931) ("It is a class suit instituted in behalf of a large number of peach growers affected by the statute . . . . [S]ince the adoption of the 38th Equity Rule, the right to maintain such a suit cannot be denied." (internal citation omitted)).

Perhaps most significantly, in *Supreme Tribe of Ben Hur v. Cauble*, this Court invoked Rule 38 in a case in which a fraternal benefit association sought to enjoin certain individuals from "prosecuting in the state courts certain suits which, it is averred, would relitigate questions settled by a decree" of the federal court on the theory that they were "bounded and concluded by the federal decree." 255 U.S. at 357. As this Court explained, "[c]lass suits have long been recognized in federal jurisprudence. . . . The subject is

provided for by rule 38 . . . of the equity rules of this court promulgated in 1912." *Id.* at 363; *see id.* at 366 ("class suits were known before the adoption of our judicial system, and were in use in English chancery"). This Court also highlighted as "significant" the "omission of the [Rule 48] qualifying clause" when Rule 38 was drafted, *id.*, concluding in the case before it that "the original suit was peculiarly one which could only be prosecuted by a part of those interested suing for all in a representative suit" and "[b]eing thus represented, we think it must necessarily follow that their rights were concluded by the original decree." *Id.*

Moreover, this long history of group litigation includes cases in which employees have sued their employers for allegedly violating the law. In *Gorley v. City of Louisville*, for example, "James T. Gorley and nine other plaintiffs" sued the city of Louisville "for the benefit of themselves and the other members of the police force" of which they were a part after they were "suspended and laid off without pay" for several days each month. 65 S.W. 844, 844-45 (Ky. 1901); *see id.* at 847 ("[t]he right of the plaintiffs to bring and prosecute this suit for their benefit, and for the others for whom they sue, seems to be conclusively settled"). And in *Grand International Brotherhood of Locomotive Engineers v. Mills*, the Arizona Supreme Court considered whether employees who believed they had been denied certain seniority rights to which they were entitled were bound by the results of prior litigation on that topic. 31 P.2d 971, 982 (Ariz. 1934) ("It is the contention of defendants that [prior] suits were what is known as class actions, and that the judgments on them are binding upon the plaintiffs in the present suits."). The court concluded that the plaintiffs were bound because "in the absence of fraud

and collusion on the part of the plaintiffs representing a certain class in a suit, all of the members of that class are bound by the judgment rendered therein." *Id.* at 984-85.

Thus, although the prevalence of group litigation in the United States has varied over time, such litigation nonetheless had a long pedigree in this country by the time the NLRA was adopted in 1935. As the next section shows, the NLRA's protections encompass employee efforts to bring the forms of group litigation that exist today, including Rule 23 class actions and FLSA collective actions, no less than it protected employee efforts to bring the forms of group litigation that existed at the time of its adoption.

II. THE NLRA'S BROAD TERM "CONCERTED ACTIVITIES" ENCOMPASSES EMPLOYEES' EFFORTS TO BRING THE TYPES OF GROUP LITIGATION LATER CODIFIED IN RULE 23 AND THE FLSA.

When the NLRA was enacted in 1935, it broadly guaranteed that "[e]mployees shall have the right to . . . engage in [] concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. As this Court has explained, "[t]he 74th Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context." *Eastex, Inc. v. Nat'l Labor Relations Bd.*, 437 U.S. 556, 565 (1978). Recognizing this, Congress chose, "as the language of § 7 makes clear, to protect concerted activities for the somewhat broader purpose of 'mutual aid or protection' as well as for the narrower purposes of 'self-organization' and 'collective bargaining.'" *Id.* The drafters of the NLRA intended that this language be interpreted expansively: in discussing an earlier ver-

sion of the bill with the same language, Senator Wagner cautioned that the bill's specific references to a "few of the practices which have proved the most fertile sources for evading or obstructing the purpose of the law" should not be viewed as "in any way placing limitations upon the broadest reasonable interpretation of its omnibus guaranty of freedom." *Hearings on H.R. 6288 Before the H. Comm. on Labor*, 74th Cong. 13 (1935), *in* 2 *Legislative History of the National Labor Relations Act, 1935*, at 2487 (1949); *see Nat'l Labor Relations Bd. v. City Disposal Sys.*, 465 U.S. 822, 835 (1984) ("There is no indication that Congress intended to limit this protection [allowing employees to band together in confronting an employer regarding the terms and conditions of their employment] to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way."); *see also* Lewis Br. 19-25 (discussing legislative history of the NLRA); Morris Br. 20-23 (same).

Given that the NLRA broadly protects "concerted activities," its protections encompass employees' efforts to bring Rule 23 class actions and FLSA collective actions no less than it protected employees' efforts to bring the forms of group litigation that existed when it was adopted in 1935, including simple joinder (which the employers' agreements in these cases also ban). This is particularly true because the Rule 23 class action and the FLSA collective action both developed out of the same tradition of group litigation that existed when the NLRA was adopted.

Federal Rule of Civil Procedure 23 currently provides that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members" if certain conditions are satisfied. Fed. R. Civ. P. 23(a). When Rule 23 was first promulgated in

1938, its drafters recognized that it was simply the latest reformulation of the centuries-old equity doctrines that permitted group litigation. James Wm. Moore & Marcus Cohn, *Federal Class Actions*, 32 Ill. L. Rev. 307, 307 (1937-1938) ("This constantly growing utilization of a two hundred and fifty year old doctrine has prompted legislative and judicial reformulation. The latest reformulation is to be found in Rule 23 of the Proposed Rules of Civil Procedure . . . ."); John K. Rabiej, *The Making of Class Action Rule 23—What Were We Thinking?*, 24 Miss. C.L. Rev. 323, 329 (2005) ("The rule carried forward equity notions of necessary joinder of parties that were recognized by the Supreme Court back in the 1800s."). Indeed, the Advisory Committee Notes explicitly identified Rule 23 as "a substantial restatement of [former] Equity Rule 38 (Representatives of Class) as that rule has been construed." Fed. R. Civ. P. 23, 1937 advisory committee note; *see Ortiz*, 527 U.S. at 832 (noting that "class actions as we recognize them today developed as an exception to the formal rigidity of the necessary parties rule in equity, as well as from the bill of peace, an equitable device for combining multiple suits" (internal citation omitted)).

As the Advisory Committee Notes further explained, Rule 23 "adopts the test of [former] Equity Rule 38," namely that "the question should be 'one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court,'" Fed. R. Civ. P. 23, 1937 advisory committee note; *see id.* (noting that the test is a "common test"). It also defined what constitutes a "'common or general interest.'" *Id.* Moreover, because "[c]ourts experienced significant difficulties in determining the binding effect of a judgment entered under Equity Rule 38," the new

rule attempted to classify the various types of class actions in a way that would make clear when judgments would bind absent class members. Rabiej, *supra*, at 330. To be sure, Rule 23 has evolved substantially since it was first promulgated in 1938, but nothing in its subsequent amendments makes it any less a type of "concerted activit[y]" than were the various types of group litigation that existed when the NLRA was adopted.

Like Rule 23, the FLSA provides for representative actions, specifically allowing for "any one or more employees" to bring "[a]n action to recover the liability prescribed [earlier in the statute] against any employer . . . in any Federal or State court of competent jurisdiction" "for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b); *see* James A. Rahl, *The Class Action Device and Employee Suits Under the Fair Labor Standards Act*, 37 Ill. L. Rev. 119, 123 (1942-43) ("it is clear from the language of section 16(b) that Congress intended to avoid multiplicity of suits and joinder difficulties by permitting a speedy and efficient determination of employee rights in some group form of action").[2]

In providing that one employee can sue on behalf of those "similarly situated," the drafters of the FLSA borrowed language that was already in use by the

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[2] While the FLSA's provision that employees may "designate an agent or representative to maintain such action for and in behalf of all employees similarly situated," 52 Stat. at 1069, was removed from the law in 1947, the provision that an employee can sue on "behalf of himself or themselves and other employees similarly situated" was left untouched. Portal to Portal Act of 1947, Pub. L. No. 80-49, § 5, 61 Stat. 84, 87 (1947) (codified at 29 U.S.C. §§ 251-262).

federal courts hearing class claims in equity. *See, e.g.*, *Carpenter v. Knollwood Cemetery*, 198 F. 297, 298 (D. Mass. 1912) ("[t]he bill alleges that this suit is brought by the complainants in behalf of themselves and all other owners of landholders' shares who are similarly situated"); *Risley v. City of Utica*, 168 F. 737 (C.C.N.D.N.Y. 1909) ("The complainant here sues in behalf of himself and all others similarly situated."); *see also* Rahl, *supra*, at 128 ("When Congress stated that action may be brought for 'employees similarly situated' it employed the very words which give rise to an ordinary class suit when they are contained in the plaintiff's pleadings."). Thus, Rule 23 class actions and FLSA collective actions both derive from the rich tradition of group litigation that existed long before the NLRA was enacted in 1935.

In sum, while Rule 23 and the FLSA did not exist in 1935, group litigation very much did. And the NLRA did not limit its protection to the precise forms of group litigation that existed at the time the law was enacted. Rather, it broadly guaranteed employees the right to engage in all "concerted activities, for the purpose of collective bargaining or other mutual aid or protection," without regard to the particular form those "concerted activities" would take. Rule 23 class actions and FLSA collective actions fall within that broad guarantee no less than the equitable forms of group litigation that existed at the time the NLRA was adopted.

CONCLUSION

The judgments of the courts of appeals in Nos. 16-285 and 16-300 should be affirmed, and the judgment of the court of appeals in No. 16-307 should be reversed.

Respectfully submitted,

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